91-1682

No. 91-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD J. LEVIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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62

QUESTION PRESENTED

1. Is the Double Jeopardy Clause's prohibition against multiple punishments violated when a State, after sentencing a defendant in a state criminal action, punishes the defendant again by: (a) using the federal government as a "tool" to institute a federal civil *in rem* forfeiture against the defendant's condominium; (b) splitting the proceeds of the federal *in rem* forfeiture action?

2. Is the Eighth Amendment's prohibition against disproportionate punishments, and excessive fines and penalties, transgressed by an *in rem* forfeiture of a condominium based on the sale of 2.5 grams of cocaine, where the owner's equity interest is 300 times greater than the value of the drugs sold?

3. Is the appropriate standard for forfeiture under Title 21 U.S.C. § 881(a)(7) a "substantial connection" test, as applied by the overwhelming majority of Circuits and as compelled by the applicable legislative history, or a less stringent, "sufficient nexus" test, as applied by the Second Circuit?

4. Is the Due Process Clause violated by an *in rem* civil forfeiture that is grossly excessive, disproportionate, and extracted to disable an individual?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statement Of The Case	2
A. Factual Background	2
B. The Decision Of The District Court	4
C. The Decision Of The Circuit Court	6
Reasons For Granting The Writ	8
I. This Court Should Resolve The Conflict Among The Circuits Regarding The Applicable Test In Forfeiture Cases	8
II. Forfeiture Of The Condominium Violated The Double Jeopardy Clause Of The Fifth Amendment	10
III. The Forfeiture Of Levin's Condominium Violated The Eighth Amendment	12
IV. Forfeiture Of The Condominium Violated The Due Process Clause Of The Fifth Amendment	15
Conclusion	19

TABLE OF AUTHORITIES

Cases	PAGE
Bartkus v. Illinois, 359 U.S. 121 (1959)	11
Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 237 (1989)	5, 12, 16
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)	6-7, 16, 18
Daniels v. Williams, 474 U.S. 327 (1986)	15
Ingraham v. Wright, 430 U.S. 651 (1977)	12-13
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	15
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	15
Missouri Pacific Ry. Co. v. Humes,115 U.S. 512 (1885)	16
Peterson v. Richardson, 370 F. Supp. 1259 (N.D.Tex. 1973), *aff'd*, 508 F.2d 45 (5th Cir), *cert. denied*, 423 U.S. 830 (1975)	17
St. Louis, I.M.& S. Ry. v. Williams, 251 U.S. 63 (1919)	16
Solem v. Helm, 463 U.S. 277 (1983)	13-15
Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482	16
United States v. Aboumussallem, 726 F.2d 906 (2d Cir. 1984)	11
United States v. Approximately 50 Acres of Real Estate Property, 920 F.2d 900 (11th Cir. 1990)	9
United States v. Busher, 817 F.2d 1409 (9th Cir. 1984)	14

PAGE

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 747 F. Supp. 173 (E.D.N.Y. 1990) 1, 4-6, 15-16

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir. 1992).....1, 6-7, 8-18, *passim*

United States Currency, 874 F.2d 298 (5th Cir. 1989). 8

United States v. Forfeiture, Stop Six Center, 781 F.Supp. 1200 (N.D. Tex. 1991)..... 9

United States v. 526 Liscum Drive, 866 F.2d 213 (6th Cir. 1989) 8

United States v. Halper, 490 U.S. 435 (1989).....5-7, 10-12, 13, 16-18

United States v. Littlefield, 821 F.2d 1365 (9th Cir. 1987)..... 14

United States v. One 1974 Cadillac Eldorado,.575 F.2d 344 (2d Cir. 1978)..... 9

United States v. One 1974 Cadillac Sedan, 548 F.2d 421 (2d Cir. 1977)..... 9

United States v. One Parcel of Land, Known as Lot 111-B, 902 F.2d 1443 (9th Cir. 1990)..... 8

United States v. One Parcel of Land and Residence at 28 Emery St., 914 F.2d (Cir. 1990) 8

United States v. One Parcel of Real Estate Commonly Known As 916 Douglas Avenue, 903 F.2d 490 (7th Cir. 1990) 8

United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane, 906 F.2d 110 (4th Cir. 1990) 8

United States v. One Tintoretto Painting, 691 F.2d 603 (2d Cir. 1982)..... 17

United States v. Premises Known As 3639-2nd St., 869 F.2d 1098 (8th Cir. 1989)..... 8

PAGE

United States v. Property Known As 6109 Grubb Road, 886 F.2d 618 (3d Cir. 1989)..... 8-9

United States v. The Premises And Real Property At 4492 South Livonia Road, 889 F.2d 1258 (2d Cir. 1989).....6, 8, 9

United States v. $321,470.00, United States Currency, 874 F.2d 298 (5th Cir. 1989)..... 8

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909).. 16

Constitutional Amendments

Fifth Amendment to the U.S. Constitution.....10-12, 15-18

Eighth Amendment to the U.S. Constitution..... 12-15

Statutes

Federal Sentencing Guidelines, Section 5B1.1(a)(2).... 15

21 U.S.C. § 881(a)(6)..... 9

21 U.S.C. § 881(a)(7).....8-9, 11

21 U.S.C. § 881(e)(1)(A)..... 11

NY CPLR § 1310-11..... 11

NY Penal Law § 110.05..... 3

Law Review

Pratt & Petersen, *Civil Forfeitures in the Second Circuit*, 65 St. John's L.Rev. 653 (1991)..... 9

Miscellaneous Authorities

1984 U.S. Code Cong. & Admin. News 3182..... 9

1990 McKinney's Session Laws, Ch. 655..... 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Edward J. Levin respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, that affirmed a judgment of forfeiture against petitioner Edward J. Levin's condominium, which had been entered in the United States District Court for the Eastern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 954 F.2d 29 (2d Cir. 1991). The opinion of the United States District Court for the Eastern District of New York is officially reported at 747 F.Supp 173 (E.D.N.Y. 1990). Copies of the Circuit and District Court opinions are annexed hereto.

JURISDICTION

The decision of the Circuit Court was entered on January 3, 1992. Levin's petition for rehearing with suggestion for rehearing en banc was denied on January 21, 1992. Accordingly, this petition for certiorari is timely. This Court's jurisdiction is invoked pursuant to Title 28, United States Code, § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

Petitioner Levin is a 51-year old divorced father of two grown children. After two years of college he worked for 15 years as the chief salesman for Seaman's Furniture. Levin purchased the defendant res, a condominium located at 38 Whalers Cove Drive, Babylon, New York (occasionally, "premises" or "condominium") in 1977 for $33,000; the premises has a present market value of about $145,000, less outstanding mortgages of $77,000. (JA 58).[1]

In July 1988, Levin made two sales of cocaine to undercover officers—of less than one gram each for $150, and $100—in the premises; a confidential informant had requested that the first sale take place in the premises. After these two sales, the principal undercover officer telephoned Levin at the condominium several times per day, *each* day during a ten-week period until his arrest by Suffolk County, New York Police on October 6, 1988; the apparent reason for the persistent telephoning was to induce Levin to make further (and perhaps larger) sales. Levin rebuffed these requests. After Levin's arrest in October 1988 on state narcotics charges, the condominium was searched, but, significantly, no drugs, weapons, large amounts of cash, drug paraphernalia, or drug records were uncovered in the premises. (JA 74-75, JA 84).

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1 References to "JA _____" designate pages in the Joint Appendix to the parties' briefs in the Second Circuit.

Levin immediately began to cooperate with state law enforcement officials after his arrest. As an example of his cooperation, on November 2, 1988, at the direction of Suffolk County Police, Levin acted as an intermediary in a sale by his source to "Sean," the principal law enforcement official, of 3.5 grams of cocaine. (JA 58, JA 75).

Notwithstanding Levin's cooperation, on November 10, 1988, the United States government (the "Government") instituted an *in rem* forfeiture action against the premises, pursuant to 21 U.S.C. § 881(a)(7) (the "Statute"). (JA 6-JA 24). Simultaneously, nine federal marshals conducted an extensive search of the premises in conjunction with executing the *in rem* warrant in the action, but uncovered no indicia of narcotics activity. (JA 75). The Complaint grounded its claim for forfeiture on allegations that on July 6, and July 20, 1988, Levin sold cocaine to undercover officers of the Suffolk County Police Department. (JA 9).

On November 14, 1988, United States District Judge Eugene H. Nickerson signed an *ex parte* seizure warrant which *inter alia* ordered the seizure of the condominium, and the immediate eviction of the premises. (JA 25-JA 29). Subsequently, however, the parties executed an Occupancy Agreement, which permitted Levin to remain in the condominium during the pendency of this action. (*See* JA 30).

In December 1988, Levin's attorney filed a timely claim on his behalf. (JA 36-JA 38). In March 1989, Levin pled guilty to one count of attempted criminal sale of a controlled substance in the third degree, pursuant to Section 110.05 of the New York State Penal Law (McKinney 1991). (JA 64-JA 72). Levin was later sentenced to a probationary term, plus a fine.

After filing his claim, Levin moved to dismiss the forfeiture Complaint. The Government subsequently cross-moved for summary judgment to forfeit the premises; and Levin submitted a reply. (JA 39-JA 43; JA 46-JA 88). In his motion papers, Levin advanced several arguments why the condominium should should not be forfeited: (1) that small sales of cocaine at the premises did not constitute "facilitation" within the meaning of the relevant statute; (2) forfeiture would violate the Eighth Amendment's prohibition

against excessive fines and penalties; and (3) forfeiture would violate substantive due process principles, and the Fifth Amendment's proscription against double jeopardy.

The Government contended, *inter alia*, in its cross-motion that the premises should be forfeited irrespective of the small amount transacted in the condominium; and that forfeiture of the condominium did not violate the Constitution.

B. The Decision Of The District Court

On September 18, 1990, the District Court, Hon. Eugene H. Nickerson, rendered a decision denying Levin's application to dismiss, and granting the Government's cross-motion for summary judgment. *United States v. Certain Real Property And Premises Known As 38 Whalers Cove Drive*, 747 F. Supp. 173 (E.D.N.Y. 1990).

Judge Nickerson rejected Levin's assertion that the two sales of a small amount of cocaine did not constitute "facilitation" under the Statute, stating in part:

> On two occasions claimant produced a controlled substance for sale from a place in his dwelling. The use of the premises repeatedly to sell and to safekeep drugs undoubtedly "facilitated" the ensuing sales according to the common definition of the term, "to make easier." *The Random House Dictionary of the English Language* 840 (1969) . . . .
>
> . . .
>
> The court [moreover] finds a sufficient nexus between the property and the drugs to conclude that claimant used his home to "facilitate" their sale.

Id. at 176.

Judge Nickerson then rejected *seriatim* Levin's arguments that the Statute was unconstitutional as applied. The District Judge dismissed Levin's assertion that the forfeiture was barred by the Double Jeopardy Clause of the Fifth Amendment, since that constitutional guarantee only prohibits successive prosecution by the same sovereign. *Id.* at 176-77. Hence, "[t]he United States does not subject a person to

double jeopardy when its seeks a forfeiture predicated on acts already punished by the state." *Id.* at 177.

Judge Nickerson next turned to the issue of whether the forfeiture violated either the Eighth Amendment's prohibitions against excessive penalties or fines and cruel and unusual punishments; or the Due Process Clause of the Fifth Amendment.

Judge Nickerson rejected the Government's suggestion that the mere labeling of the instant *in rem* forfeiture as "civil" precluded an Eighth Amendment analysis, stating that a similar argument had already been rejected by the Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and in *United States v. Halper*, 490 U.S. 435 (1989). Relying on *Halper* and other Supreme Court precedents, Judge Nickerson reasoned that certain civil sanctions constituted "punishment"—regardless of their "civil" label—under the Eighth Amendment, and the pivotal issue was "whether the forfeiture serves some alternate [remedial] purpose as well, and whether the penalty inflicted is excessive in relation to that alternative purpose." *38 Whalers Cove Drive*, 747 F. Supp. at 179.

Employing this analysis, Judge Nickerson concluded that the forfeiture of the condominium offended neither the Eighth Amendment nor the Due Process Clause, stating in part:

> Here, Levin used his home more than once to conduct drug transactions. Although perhaps trivial in their dollar amount, these sales are quite serious in their collateral consequences. The maintenance of the programs to deal with drug programs is expensive. Moreover, there were immediate costs to the federal government in bringing this proceeding and to Suffolk County for its law enforcement efforts. . . .
>
> . . . .
>
> Forfeiture of Levin's approximately $70,000 interest in the condominium does not seem a grossly excessive amount for his share of the costs of remedying the ills

> occasioned by drugs. Though there may be cases where further elaboration of the government's loss would be warranted, this is not a forfeiture that stands near the line between remedy and punishment.

Id. at 181.

C. The Decision of the Circuit Court

On appeal to the Second Circuit, Levin argued that the District Court's ruling should be reversed, on statutory and substantive due process grounds. Levin also alleged that forfeiture of his condominium constituted punishment under *United States v. Halper*, and that, as such, violated the Fifth and Eighth Amendments. The Second Circuit rejected Levin's statutory and due process challenges; moreover, while it agreed that *Halper* appeared to raise a presumption that forfeiture constituted punishment, even if so viewed, the forfeiture did not violate Levin's constitutional rights. *United States v. Certain Real Property And Premises Known As 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992).

Adhering to the "sufficient nexus" standard articulated in *United States v. Premises and Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1269 (2d Cir. 1989) ("*Livonia Road*"), Judge John M. Walker, for the court, rejected Levin's argument that the Statute "must be read to require the proving of a 'substantial connection' between the property and the crime." *38 Whalers Cove Drive*, 954 F. 2d at 33.

The court next dismissed Levin's substantive due process argument, ruling that "[t]he Supreme Court has long held that forfeiture of property used for illegal purposes may be deemed unduly oppressive only when the owner of the forfeited property is innocent of the wrongful activity, uninvolved and unware of it and has done 'all that reasonably could be expected to prevent the proscribed use of his property.' " (quoting from *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974)). *Id.* Judge Walker noted that "Levin can hardly be said to have done everything possible to prevent the property's use for illegal purposes. Under

Calero-Toledo, the forfeiture therefore does not offend substantive due process." *Id.* at 33-34.

Judge Walker then held that "[w]e read *Halper* to apply to civil forfeitures. Forfeitures that are overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forefeitures are shown to serve articulated, legitimate civil purposes." *Id.* at 35. Such legitimate civil purposes include removing instrumentalities of crime from general circulation or compensating the government for its investigative and enforcement expenditures. *Id.* at 35-36.

Applying these principles to the forfeiture under review, the Circuit determined that the forfeiture of Levin's condominium constituted punishment under *Halper*:

> The forfeiture of Levin's interest in the residence was close to *three hundred times* the total value of cocaine found inside it. We find as a matter of law that the forefeiture [sic] is overwhelmingly disproportionate compared to the value of the relevant drug transactions, and that therefore a rebuttal [sic] presumption that the forfeiture is punitive in nature is created.

Id. 954 F.2d at 37 (emphasis added).

Notwithstanding this conclusion, Judge Walker ruled that the forfeiture did *not* violate the constitutional limits imposed by the Double Jeopardy Clause and the Eighth Amendment. Judge Walker concluded that the Double Jeopardy Clause was inapplicable because of the "dual sovereignty" doctrine. Finally, the court dismissed Levin's Eighth Amendment claims that the forfeiture constituted cruel and unusual punishment or an excessive fine. *Id.* at 38-39.

REASONS FOR GRANTING THE WRIT

POINT I

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICABLE TEST IN FORFEITURE CASES

As stated above, the *38 Whalers Cove Drive* panel adhered to the "sufficent nexus" standard, articulated in *Livonia Road*, for adjudicating forfeiture cases under the Statute. We submit that the Second Circuit's test not only contravenes the overwhelming weight of decisional authority, moreover, it ignores relevant legislative history. We submit that the Court should grant the petition for certiorari to resolve this conflict among the Circuits.

The vast majority of Circuits that have confronted the issue of the appropriate standard for adjudicating forfeitures under the Statute have adopted a "substantial connection" standard. *See e.g. United States v. Parcel of Land and Residence at 28 Emery St.*, 914 F.2d 1, 3-4 (1st Cir. 1990); *United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 112-13 (4th Cir. 1990); *United States v. $321,470.00, United States Currency*, 874 F.2d 298 (5th Cir. 1989); *United States v. 526 Liscum Drive, Dayton, Montgomery County*, 866 F.2d 213 (6th Cir. 1989); *United States v. Premises Known as 3639-2nd St. N.E.*, 869 F.2d 1093 (8th Cir. 1989); *United States v. One Parcel of Land, Known as Lot 111-B*, 902 F.2d 1443 (9th Cir 1990) (per curiam). *Compare Livonia Road*, 889 F.2d at 1269 ("sufficent nexus") and *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Ave.*, 903 F.2d 490, 493-94 (7th Cir. 1990) ("more than an incidental or fortuitous connection" to the crime).

Perhaps more significantly, the "substantial connection," rather than "sufficent nexus," standard appears to be mandated by a reading of relevant legislative history. *See United States v. Property Known As 6109 Grubb Road*, 886 F.2d

618 (3d Cir. 1989), discussing the legislative history of 21 U.S.C. § 881(a)(6):[2]

> Quite plainly, Congress stated that "[d]ue to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." Joint Explanatory Statement of Titles II and III, 124 Cong. Rec. S17647 (October 7, 1978) *reprinted at* 1978 U.S. Code Cong. & Admin. News 9518, 9522 (1979) ["Joint Explanatory Statement"].

Id. at 625 (footnote deleted). *Accord*, *United States v. Lot 111-B*, 902 F.2d at 1445 (citing Joint Explanatory Statement for proposition that "[t]he intent of the forfeiture provision is to seize all property that has a 'substantial connection' to the illegal drug activity"); *see also United States v. Approximately 50 Acres of Real Property*, 920 F.2d 900, 902 n.2 (11th Cir. 1990) (citing Joint Explanatory Statement); *United States v. Forfeiture, Stop Six Center*, 781 F. Supp. 1200, 1205-06 (N.D. Tex. 1991) (same); Pratt & Petersen, *Civil Forfeitures in the Second Circuit*, 65 St. John's L. Rev. 653, 668 (1991) ("Congress explicitly stated 'it is the intent of these provisions that property would be forfeited only if there is a *substantial connection* between the property and the underlying criminal activity' ").

It is also noteworthy that both decisions relied on by the *Livonia Road* panel to fashion a "sufficient nexus" test were decided before the issuance of the Joint Explanatory Statement, excerpted above. *See United States v. One 1974 Cadillac Eldorado*, 575 F.2d 344 (2d Cir. 1978) and *United States v. One 1974 Cadillac Sedan*, 548 F.2d 421 (2d Cir. 1977) (both applying "sufficient nexus" test). Accordingly, in light of the overwhelming weight of authority from other Circuits, and the relevant legislative history, this Court should grant certiorari to resolve the important issue of the applicable standard for deciding forfeitures under the Statute.

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2 The Statute is derived directly from Section 881(a)(6).

POINT II

FORFEITURE OF THE CONDOMINIUM VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

As set forth above, forfeiture of Levin's condominium was effected after Levin had been sentenced to a probationary term in New York State Supreme Court for his attempted sale of a controlled substance. It is respectfully submitted that the subsequent federal forfeiture, in which it is undisputed that New York State will eventually share the proceeds (*see* JA 87), violated the Double Jeopardy Clause's prohibition against multiple punishments. *See United States v. Halper*, 490 U.S. at 448-49.

In *Halper*, the Court ruled that under the Double Jeopardy Clause, a defendant who has already been punished in a criminal prosecution, such as Levin, may not be subjected to an additional *civil* sanction unless it was *exclusively* remedial, since that would constitute multiple punishment:

> [A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Id. at 448 (emphasis added; citation omitted). Applying the *Halper* test here, it is submitted that the forfeiture of Levin's condominium constituted a second "punishment"—by New York State—prohibited by the Double Jeopardy Clause.

While endorsing Levin's argument that the forfeiture constituted "punishment" under *Halper*, *see* 954 F.2d at 37, the Second Circuit in *38 Whalers Cove Drive* nonetheless dismissed Levin's argument that the forfeiture violated the Double Jeopardy Clause, since the "Double Jeopardy Clause is inapplicable when separate governments prosecute the same defendant, for the defendant has offended both sovereigns." *Id.* 954 F.2d at 38.

The Second Circuit also rejected Levin's contention that this case fell within the "tool" exception to the "dual sover-

eignty" principle. *Id. See United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984) (Newman, J.) (exception to "dual sovereignty" doctrine exists where "one prosecuting sovereign can be said to be acting as a 'tool' of the other." (quoting *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959)). The Circuit stated in *38 Whalers Cove Drive*:

> This exception is not triggered simply by cooperation between the two authorities, however. The state government must have effectively manipulated the actions of the federal government, so that federal officials retained little or no independent volition . . . . [T]he fact that the Attorney General may choose to share the forfeited property with a local law enforcement agency is inadequate to show that the United States government, which no doubt has its own interest in the proceeds, is here acting as a "cover" for the Suffolk County Police Department.

Id. 954 F.2d at 38 (citations omitted).

The Second Circuit's conclusion was incorrect, and, accordingly, the petition should be granted. Here, the United States Government was plainly acting as the "tool" of the Suffolk County Police and thus the "dual sovereignty" rule should not have precluded application of Double Jeopardy safeguards. The manner in which the United States Government acted as a "tool" is manifest: prior to November 1, 1990, when an amendment of New York C.P.L.R. §§ 1310 and 1311 (McKinney 1991) took effect—broadening New York's civil forfeiture laws to include real property—New York State had *no authority* to civilly seize or forfeit real property for narcotics violations. *See* 1990 McKinney's Session Laws, Ch. 655. What usually occurred, and transpired here, is that the United States Government provided a mechanism (under Section 881(a)(7)) whereby state authorities, such as Suffolk County here, could civilly forfeit real property—after criminal proceedings were completed—and thereby enjoy a lion's share of the forfeited proceeds. *See* 21 U.S.C. § 881(e)(1)(A). In short, the United States Government was not simply a "tool," here it was an indispensable "tool."

Levin argued on appeal that the Suffolk County Police should have been precluded from sharing any forfeiture proceeds because it constituted *a second punishment*—following, as it did, an initial criminal punishment—and, to that extent, was barred by the Double Jeopardy Clause. *See Halper*, 490 U.S. at 448-49. The Second Circuit nevertheless rejected this contention in *38 Whalers Cove Drive*, stating: "Nor does the receipt by the state enforcement agency of part of the proceeds implicate the state in any punishment by virtue of the forfeiture since the forefeiture is being effected by the United States government." *Id.*

This conclusion is insupportable in light of *Halper*. While the forfeiture may have been technically "effected" by the federal government, New York State fully participated in the forfeiture proceeding, and is attaining, for its efforts, a second punishment of Levin. Under *Halper*, this constituted a multiple punishment, violative of the Double Jeopardy Clause.

POINT III

THE FORFEITURE OF LEVIN'S CONDOMINIUM VIOLATED THE EIGHTH AMENDMENT

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is submitted that the disproportionate forfeiture in this case—Levin's equity interest in the condominium is worth *300 times* the very small amount of drugs sold there—violated the Eighth Amendment.

Although it has been invoked almost exclusively in criminal cases, the Court has left open the possibility that the Cruel and Unusual Punishments or Excessive Fines Clauses of the Eighth Amendment applies in certain civil cases. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. at 275, n. 21 (*Halper* "implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendments concerns."); *Ingraham v. Wright*, 430 U.S. 651, 669, n. 37 (1977) ("Some punishments, though not labeled 'crimi-

nal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment.").

The Second Circuit, in *38 Whalers Cove Drive*, held that it "read *Halper* to apply to civil forfeitures." *Id.* 954 F.2d at 35. Nonetheless, relying on a test articulated by the Court in *Solem v. Helm*, 463 U.S. 277, 290-92 (1983), the *38 Whalers Cove Drive* court rejected Levin's arguments under the Eighth Amendment, stating: "The Eighth Amendment proscribes only *extreme* punishments. Even assuming that the entire amount of the forfeiture here is punishment, it does not violate the outer confines set by the Eighth Amendment." *Id.* at 38 (emphasis added). We submit that the Second Circuit's analysis of the factors enunciated in *Solem*, and its progeny, was improperly restrictive, and that forfeiture of the condominium in fact did exceed Eighth Amendment parameters.

Solem articulated a three-part standard for "guiding" proportionality claims under the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem*, 463 U.S. at 292. While employing the outline of the *Solem* framework in adjudicating Levin's Eighth Amendment claim, the *38 Whalers Cove Drive* panel nevertheless, disregarded, other "accepted principles," *Solem* at 293, that are central to any Eighth Amendment examination.

For example, the *38 Whalers Cove Drive* court noted that it "need not linger" as to the first *Solem* factor, citing three decisions in which "the Supreme Court has recognized the serious threat posed by drug offenses in the context of an Eighth Amendment analysis." 954 F.2d at 38-39. However, the Second Circuit's purported reiteration of the first *Solem* factor—"the inherent gravity of the offense"—actually was a truncated version of the original, since *Solem* in fact spoke of "the gravity of the offense *and* the harshness of the penalty." 463 U.S. at 292 (emphasis added). The lower court also ignored other principles that are bear on *Solem*'s first

factor, such as the "harm caused or threatened to the victim or society, and the culpability of the offender." *Id.* 463 U.S. at 292.

Moreover, as the Ninth Circuit observed in *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987), in a similar context:

> In considering the harm caused by defendant's conduct, it is certainly appropriate to take into account its magnitude: the dollar volume of the loss caused, whether physical harm to persons was inflicted, threatened or risked, or whether the crime has severe collateral consequences, *e.g.*, drug addiction. *See Solem*, 463 U.S. at 293, 103 S. Ct. at 3011. In addition the court may consider the benefit reaped by the convicted defendant.
>
> . . . .
>
> With regard to the defendant's culpability, *Solem* observed that among other things, the defendant's state of mind and his motive in commiting the crime should be considered.

Id. at 1415 (citations and footnote omitted); *accord*, *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987).

Equally important, in evaluating the harshness of the penalty under *Solem*, a court must consider "the *total punishment imposed* for the offense, which would *include not only the forefeiture but any incarceration, fines or probation* imposed by the district court." *Busher*, 817 F.2d at 1415 n. 10 (emphasis added). In short, is respectfully submitted that, in *38 Whalers Cove Drive*, the Second Circuit failed to take into account these other, pertinent principles in analyzing the first *Solem* factor; application of the complete first *Solem* criterion would result in a different conclusion.

The Second Circuit's analysis of the remaining two *Solem* factors was equally flawed. In attempting to compare forfeiture of the condominium to an "equivalent" sentence under the federal Sentencing Guidelines, the lower court stated that Levin "would presumptively be fined $30,000 and receive a sentence of 10 to 37 months." 954 F.2d at 39. Such a "presumptive" sentence is highly unrealistic. In actuality, Levin,

having pled guilty, would probably have earned a two-level reduction, to Offense Level 10, and might well have been sentenced to a term of probation coupled with conditions of confinement. *See* Sentencing Guidelines, Section 5B1.1(a)(2).

While the appeals court recognized that the federal and state sentences it posited were "merely possible sentences," *id.*, nevertheless, there is no valid parity since those criminal sentences—after the obvious benefit of trial by jury—are not truly comparable to punishment imposed via a summary judgment motion. Moreover, as noted above, the lower court's analysis failed to take into account the *total* punishment involved in assessing the second and third *Solem* prongs. *See Busher.*

In sum, it is respectfully submitted that the Second Circuit's Eighth Amendment analysis was deficient. Under a full-blown *Solem* analysis, the forfeiture of Levin's condominium would have failed to pass Eighth Amendment muster.

POINT IV

FORFEITURE OF THE CONDOMINIUM VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Forfeiture of the condominium also violated the Due Process Clause of the Fifth Amendment. That provision applies to any legal proceeding by which any person may be deprived of "life, liberty, or property." In its most elemental form, substantive due process "protect[s]. . . the individual against arbitrary action[s] of government," *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted); see also, *e.g.*, *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981) (due process "expresses the requirement of 'fundamental fairness' "). As the Court has held, the protections of the due process clause extend to "civil . . . defendants . . . [seeking] to protect their property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). As District Judge Nickerson recognized, the interests protected by the Due Process Clause of

the Fifth Amendment and by the Eighth Amendment overlap. 747 F. Supp. at 179. Nevertheless, the Second Circuit, relying on the Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), rejected Levin's argument that the forfeiture of his condominium violated the Due Process Clause of the Fifth Amendment, finding that "Levin can hardly be said to have done everything possible to prevent the property's use for illegal purposes." 954 F.2d at 33. We submit that the Second Circuit's conclusion was erroneous.

The Court has long recognized that the Due Process Clause limits the amount of a civil monetary penalty that may be imposed pursuant to a statutory scheme. Hence, more than a century ago, the Court applied the Due Process Clause in reviewing the constitutionality of a statutory double-damages penalty. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 522-23 (1885). Similarly in *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909), the Court again considered a due process challenge to a state civil penalty, holding that the Constitution would be violated by "fines. . . [that] are so grossly excessive as to amount to a deprivation of property without due process of law." 212 U.S. at 111. And in *St. Louis, I.M. & S. Ry. v. Williams*, 251 U.S. 63 (1919), the Court recognized that the Due Process Clause "places a limitation upon the power of [governments] to prescribe [civil] penalties" that are "wholly disproportioned to the offense and obviously unreasonable." *Id.* at 66-67. See also, *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915) (excessive penalties vacated since "so plainly arbitrary and oppressive as to be nothing short of a taking of. . . property without due process of law"); *Browning-Ferris Inds. v. Kelco Disposal Inc.*, 492 U.S. at 275 (government prevented from "extracting large payments or forfeitures for the purpose of raising revenue or disabling some individual"), and the opinion in *Browning-Ferris* by retired Justice Brennan.

The Court, in *Halper*, ruled that the Double Jeopardy Clause of the Fifth Amendment restricts the amounts the government may recover in a civil False Claims action after a

defendant has already been punished in a criminal action, stating:

> We must leave to the trial court the discretion to determine . . . the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

Id. at 450. In *Halper*, the Court consequently vacated the Government's statutory recovery of $130,000 where it was found to be "sufficiently disproportionate" to the defendant's fraud, which amounted to $585. *See also*, *Peterson v. Richardson*, 370 F. Supp. 1259, 1267 (N.D.Tex. 1973), *aff'd*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975) (restricting government to less than full statutory recovery under False Claims Act when full sanction would be "unreasonable" and "not remotely related to" to government's actual losses and damages).

The principle that emerges from the foregoing is that, in civil cases, the Due Process Clause restricts the Government to reasonable damages, and prohibits the Government from a recovery that is excessive, disproportionate, and/or punitive. This rule of reason is also clearly applicable in the civil forfeiture context. Thus, in *United States v. One Tintoretto Painting*, 691 F.2d 603, 608 (2d Cir. 1982), the court noted that a forfeiture would be improper where "it would simply be an arbitrary act, serving no legitimate government interest, oppressive and harsh, and in our view contrary to the Fifth Amendment." Under these standards, in civil forfeitures, as in the context of civil actions in general, the Due Process Clause prevents the Government from recovering an amount which is "wholly disproportioned" to the offense, or which "punishes" or "disables an individual." In such cases, the taking is quintessentially an arbitrary forfeiture of the claimant's property that is fundamentally unfair, and which deprives the claimant of due process of law.

Applying these precepts here, it is clear that the forfeiture of Levin's condominium would undeniably be disproportionate and punitive, and thus violative of the Due Process Clause. The forfeiture of Levin's condominium, having a

value of more than $70,000, would be absurdly excessive and disproportionate to the miniscule amount of drugs sold by him. Indeed, the forfeiture would be twice as great as the penalty considered as too harsh in *Halper*.

Contrary to the Second Circuit's conclusion, the Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, does not mandate a different result. In *Pearson Yacht*, police found one marijuana cigarette aboard a $20,000 yacht that had been leased by Pearson. Although Pearson had no involvement in or knowledge of the contraband aboard the vessel, it was nonetheless forfeited, because the Court was evidently not convinced that Pearson "did all that it reasonably could to avoid having its property put to an unlawful use." *Id.* 416 U.S. at 690. The Government argued in the courts below that *Pearson Yacht* applies *a fortiori* to the case at bar, because if the property of innocent owners may be forfeited irrespective of magnitude, then certainly the property of "non-innocent" owners, such as Levin, may be forfeited. This argument miscontrues *Pearson Yacht*.

There are salient differences between *Pearson Yacht* and the present case which deny it preclusive effect. First, the claimant there sued under the "just compensation" clause of the Fifth Amendment, and did not raise a substantive due process claim; secondly, Pearson did not advance a "disproportionality" argument, *i.e.*, that the forfeiture there was beyond the scope of the Puerto Rican statute involved, because of the small amount of drugs involved. In short, no constitutional attack was mounted in *Pearson Yacht* that addressed—let alone foreclosed—Fifth Amendment due process examination in the present case.

In summary, the Due Process Clause plainly places outside limits on the amounts that the Government may recover in civil actions and forfeiture lawsuits. It is further clear that the forfeiture of Levin's premises transgressed those constitutional boundaries, because of its punitive and disproportionate dimensions.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
April 17, 1992.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 981—August Term, 1990

(Argued February 14, 1991 Decided January 3, 1992)

Docket No. 90-6268

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

CERTAIN REAL PROPERTY AND PREMISES KNOWN AS 38 WHALERS COVE DRIVE, BABYLON, NEW YORK,

Defendant,

EDWARD J. LEVIN,

Claimant-Appellant.

Before:

PIERCE, WINTER, and WALKER,

Circuit Judges.

Appeal from a judgment of forfeiture pursuant to 21 U.S.C. § 881(a)(7), entered in the United States District Court for the Eastern District of New York (Eugene H. Nickerson, *Judge*) on October 4, 1990, on statutory and constitutional grounds. Affirmed.

RICHARD B. LIND, New York, New York, for *Claimant-Appellant*.

STEPHEN J. RIEGEL, Assistant United States Attorney for the Eastern District of New York (ANDREW J. MALONEY, United States Attorney, ROBERT L. BEGLEITER, Assistant United States Attorney, of Counsel), Brooklyn, New York, for *Plaintiff-Appellee*.

WALKER, *Circuit Judge*:

Claimant Edward J. Levin appeals from a judgment of forfeiture entered pursuant to 21 U.S.C. § 881(a)(7) on October 4, 1990, in a civil proceeding in the Eastern District of New York (Eugene H. Nickerson, *Judge*). That judgment deprived Levin of his residence, which is located at 38 Whalers Cove Drive, Babylon, New York. We find that the forfeiture was authorized by the statute and not prohibited by substantive due process. Levin also argues that the forfeiture must be classified as punishment under *United States v. Halper*, 490 U.S. 435 (1989), and that as punishment, the forfeiture violates the Fifth and Eighth Amendments. While we agree that *Halper* appears to require us to presume the forfeiture to be punishment and to afford the government an opportunity to prove oth-

erwise, the forfeiture, even if seen as punishment, does not violate Levin's constitutional rights. Accordingly, we affirm the district court's judgment of forfeiture.

BACKGROUND

This case concerns the forfeiture of Levin's personal residence, a condominium located at 38 Whalers Cove Drive, Babylon, New York. The condominium, purchased in 1977, is now worth approximately $145,000. Levin has an equity interest in the property valued at approximately $68,000; mortgages outstanding on the property total $77,000.

In July, 1988, Levin twice sold cocaine inside the condominium to a confidential informant for a total sum of $250. The quantity of the sale is disputed but in any event amounts to no more than 2 1/2 grams. The record indicates, and the government does not dispute, that the confidential informant requested that the first sale take place inside the condominium. The second sale, on July 20, was also made in Levin's home—it is unclear who specified the location. (We are not here concerned with a third small sale which took place outside the condominium.) The confidential informant telephoned Levin frequently after the sales to request that Levin make further sales. Levin declined.

Levin was arrested by the Suffolk County Police on October 6, 1988 on charges of criminal sale of a controlled substance based on the above transactions. The condominium was searched. No drugs, weapons, large amounts of cash, drug paraphernalia, or drug records were discovered.

Subsequent to his arrest, Levin began cooperating with law enforcement authorities, and later pleaded guilty in the Supreme Court of the State of New York for the County of Suffolk to attempted criminal sale of a controlled substance. He received a probationary sentence and a small fine.

On November 10, 1988, the United States government instituted an *in rem* forfeiture action against Levin's condominium, pursuant to 21 U.S.C. § 881(a)(7). On November 14, 1988 the government obtained an *ex parte* seizure warrant for the premises. Pursuant to the warrant, the United States Marshals Service seized the property, simultaneously searching it extensively. No indication of narcotics activity was found.

After timely filing a claim of ownership to the property, Levin moved to dismiss the complaint. The Government cross-moved for summary judgment of forfeiture.

In a thoughtful, well-written opinion filed September 20, 1990, reported at 747 F. Supp. 173 (E.D.N.Y. 1990), Judge Nickerson denied Levin's motion to dismiss and granted the government's cross-motion for summary judgment of forfeiture. The district court ruled that the property was properly subject to forfeiture pursuant to the terms of 21 U.S.C. § 881(a)(7). The district court also rejected Levin's arguments that the application of the forfeiture provision in his case violated the Fifth and Eighth Amendments to the United States Constitution. Judgment of forfeiture was entered.

Levin then filed this appeal.

DISCUSSION

Levin raises four arguments: (1) the forfeiture is not authorized under the statute, 21 U.S.C. § 881(a)(7); (2) the forfeiture violates substantive due process; (3) the Double Jeopardy Clause of the Fifth Amendment prohibits the forfeiture; and (4) the Eighth Amendment prohibits the forfeiture.

A. *Forfeiture under 21 U.S.C. § 881(a)(7)*

We turn first to the statutory argument. 21 U.S.C. § 881(a)(7) provides for the forfeiture of real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a violation of the narcotics laws punishable by more than one year's imprisonment. As we observed in *United States v. 141st Street Corp.*, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991), "Congress intended forfeiture to be a powerful weapon in the war on drugs." As such, the statute is broadly drafted to reach a wide array of property which may be used to accomplish illegal purposes. Levin contends, however, that the statute must be read to require the proving of a "substantial connection" between the property and the crime. We disagree.

In *United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1269 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990), we explicitly rejected this argument, stating that the statute requires only a "nexus" between the drug activity and the property. Here, the drug activity was sufficiently connected with the property to bring the property within the purview of the statute. As a situs for the sales, the property "facilitated" them by permitting them to be conducted in an atmosphere of relative privacy. *See United States v. Premises Known as 3639-*

2nd St., N.E., 869 F.2d 1093, 1096 (8th Cir. 1989), *reh'g denied*, 1989 U.S. App. LEXIS 5212 (1989). We note further that the statute permits forfeiture to be predicated upon only a small quantity of drugs. *See also United States v. One 1986 Mercedes Benz*, 846 F.2d 2, 5 (2d Cir. 1988) (*per curiam*). We therefore agree with the district court that the property was subject to forfeiture under the terms of the statute.

B. *Substantive Due Process*

Levin next argues that the civil forfeiture of his residence violates substantive due process. Substantive due process protects the individual "against arbitrary action[s] of government," *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted). We disagree with Levin here as well. The Supreme Court has long held that a forfeiture of property used for illegal purposes may be deemed unduly oppressive only when the owner of the forfeited property is innocent of the wrongful activity, uninvolved and unaware of it, and has done "all that reasonably could be expected to prevent the proscribed use of his property." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689, *reh'g denied*, 417 U.S. 977 (1974). Similarly, in *United States v. One Tintoretto Painting Entitled "The Holy Family with St. Catherine & Honored Donor"*, 691 F.2d 603 (2d Cir. 1982), we found that due process concerns were raised by the forfeiture of a painting only because the owner arguably acted " 'in good faith and without negligence.' " 691 F.2d at 607 (quoting *United States v. One 1936 Model Ford V-8 DeLuxe Coach*, 307 U.S. 219, 236 (1939)).

Here, Levin committed a crime inside the condominium. Even if the informant was responsible for suggesting the condominium as the site of the drug

transaction, Levin can hardly be said to have done everything possible to prevent the property's use for illegal purposes. Under *Calero-Toledo*, the forfeiture therefore does not offend substantive due process.

C. *Other Constitutional Arguments: Fifth Amendment Double Jeopardy and Eighth Amendment*

1. *Classifying Civil Sanctions as Punishment*

Levin's arguments that the forfeiture violates the Double Jeopardy Clause of the Fifth Amendment and the Eighth Amendment's bar on Cruel and Unusual Punishment and Excessive Fines are predicated upon his contention that the forfeiture is in reality a criminal penalty and, as such, is subject to constitutional limitations on punishment. *See generally* Pratt & Petersen, *Civil Forfeiture in the Second Circuit*, 65 St. John's L. Rev. 653, 668-70 (1991) (discussing "disturbing implications" of courts' failure to regard civil forfeiture as punishment). He argues that the forfeiture of his $68,000 interest in the condominium—and the resultant loss of his home—as a consequence of a sale of $250 worth of cocaine must be seen as punishment, since it, or at least some part of it, cannot be said to serve proper civil purposes.

Levin's point here is not that Section 881(a)(7) is properly read as a penal, rather than civil, enactment, *see generally United States v. Ward*, 448 U.S. 242, 248, *reh'g denied*, 448 U.S. 916 (1980); *United States v. $2500 in U.S. Currency*, 689 F.2d 10, 14 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984), but rather that the application of the statute in the circumstances of his case is punishment. Levin relies on *United States v. Halper*, 490 U.S. 435 (1989), in which the Supreme Court found that a civil sanction imposed following a criminal sentence for

filing false claims violated the Double Jeopardy Clause's proscription of multiple punishments.[1]

In *Halper*, an employee of a medical laboratory filed sixty-five false claims for Medicare reimbursement, each of which overstated the amount reimbursable to the lab by $9, resulting ultimately in a fraud on the government of $585. Under the False Claims Act, 31 U.S.C. §§ 3729-31, the government sought a civil penalty of $2000 plus double damages for each violation of the Act. This subjected Halper to a penalty of over $130,000, "exponentially greater than the amount of the fraud, and . . . also many times the amount of the Government's total loss." 490 U.S. at 445. Despite the sanction's imposition in a civil proceeding, pursuant to a civil enactment, the Justices unanimously recognized that the sanction as applied could be "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." 490 U.S. at 442.

The Court applied a "rule of reason" to the sanction. Finding it "overwhelmingly disproportionate," and without "rational relation" to the purported goal of compensating the government, the Court presumed the sanction to be punitive. 490 U.S. at 449-50. It then shifted the burden to the government to prove otherwise, through an "accounting of [its] damages and costs."[2] 490 U.S. at 449-50.

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1 The *Halper* Court stated that multiple sanctions such as those imposed on Halper would not violate the Double Jeopardy Clause if they were imposed in a single proceeding. *Halper*, 490 U.S. at 440-41, 447; *see North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); Note, United States v. Halper, *Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U.L.Rev. 112, 137-39 (1991).

2 The Court concluded provisionally that the $130,000–plus sanction was punitive, based on the district court's estimate of the government's

The Court cautioned, however, that the burden of accounting for a civil sanction would fall on the government only in the "extreme case," and that leeway was to be given the government's attempt to achieve "rough remedial justice," particularly in view of quantifying the "precise amount of the Government's damages and costs." *Halper*, 490 U.S. at 449; *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550-51, *reh'g denied*, 318 U.S. 799 (1943). As a general rule, therefore, particularly where few statutory violations are involved, the Court stated that it would not disturb a "fixed penalty plus double damages provision," together with "reasonable liquidated damages clauses." *Halper*, 490 U.S. at 449.

Where an accounting is appropriate, however, *Halper* requires a district court to compare the government's proven damages and costs against the sanction the government seeks to impose. Following an accounting, a sanction must be classified as punitive when the size of the sanction can not fairly be attributed to remedial purposes, "but rather can only be explained as *also* serving either retributive or deterrent purposes." 490 U.S. at 448 (emphasis added). The amount in excess must be deemed punishment.

The classification of a sanction as punitive under *Halper* does not automatically transform the sanction proceeding into a criminal prosecution, with all the attendant procedural safeguards required by the Constitution. For example, the applicability of Sixth Amendment protections to statutory proceedings and the standard of proof used in those proceedings are determined not with reference to the particular sanction ultimately imposed, but

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costs and damages at $16,000. The Court then remanded the case, however, giving the government an opportunity to prove that its costs and damages in fact exceeded the district court's estimate.

rather by considering the proceeding's inherent nature, identified through recourse to "statutory language, structure, and intent." *Halper*, 490 U.S. at 447 (citing *United States v. Ward*, 448 U.S. at 248-51).

Nonetheless, certain constitutional protections do attach when an individual is subjected to a "civil" sanction that in effect is punishment. Such an individual is protected against multiple punishments under the Double Jeopardy Clause, because that constitutional protection is "intrinsically personal," serving a "humane" interest. *See Halper*, 490 U.S. at 447 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. at 554 (Frankfurter, J., concurring)).

Furthermore, we agree with Levin that Eighth Amendment protections attach when an individual is subjected to a civil sanction classified as punitive under *Halper*. Like the Double Jeopardy Clause, the Eighth Amendment is a "personal" and "humane" limitation on the government's ability to punish an individual. Although the Supreme Court did not explicitly so rule in *Halper*, in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), decided shortly after *Halper*, the Court stated that *Halper* "implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns . . . ." 492 U.S. at 275 n.21; *see also Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977) ("Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."); Note, *Crossing the Line Between Rough Remedial Justice and Prohibited Punishment*, 65 Wash. L. Rev. 437 (1990).

2. *Implications of* United States v. Halper *for civil forfeitures*

We read *Halper* to apply to civil forfeitures. Forfeitures that are overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forfeitures are shown to serve articulated, legitimate civil purposes. *See* 21 U.S.C. § 881 (forfeiture provisions). Among those purposes, the government may use *in rem* forfeiture to remove instrumentalities of crime from general circulation and prevent further illicit use of harmful objects, a goal springing from the historic fiction underlying forfeiture that "an instrument of harm is itself culpable." *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 747 F. Supp. 173, 177 (E.D.N.Y. 1990) (hereinafter *38 Whalers Cove Drive*); *see One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*. We have also stated that forfeiture of an object may substitute for a civil fine, "imped[ing] the success of the criminal enterprise by eliminating its resources and instrumentalities," *United States v. $2500 in U.S. Currency*, 689 F.2d at 13; *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 687. The government may also use forfeitures to compensate the government's investigation and enforcement expenditures, in addition to any damages the government may suffer directly as a result of criminal acts, essentially as a form of "liquidated damages" for harm caused by an individual wrong-doer. *See* 21 U.S.C. § 881(e); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237, 238 (1972) (per curiam); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 687 & n. 26.

Civil forfeitures do not retain their civil character if they are used in order to achieve deterrence or retribution, however. "Retribution and deterrence . . . are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n. 20 (1979). We acknowledge that otherwise proper forfeiture actions may have the collateral effect of deterring future drug offenders. *See 38 Whalers Cove Drive*, 747 F. Supp. at 179. This fact alone will not render a particular forfeiture punitive in nature. Rather, *Halper* requires us to examine whether the forfeiture at hand is fully justified by the civil and remedial purposes it ostensibly serves, or whether it or a portion thereof can be explained only with reference to punitive goals.

In evaluating whether a forfeiture under § 881(a)(7) serves its ostensible goals, we focus upon the effects on the claimant who has violated the statute, despite the fact that the forfeiture actions are brought *in rem*. *See Livonia Road*, 889 F.2d at 1270. *See also United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (for Eighth Amendment purposes, "there is no substantial difference between an *in rem* proceeding and a[n *in personam* criminal] forfeiture proceeding brought directly against the owner"); *cf. United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1971). Where an individual has suffered severe penalties in an *in rem* forfeiture proceeding, it is particularly appropriate to address the substance of that proceeding. *See United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289, 1299 (7th Cir. 1990) (Cudahy, J., concurring); *United States v. Premises Known as 3639-2nd St., N.E.*, 869 F.2d at 1098 (Arnold, J., concurring).

We therefore hold that a forfeiture under 21 U.S.C. § 881(a)(7) will not be presumed punitive where the

seized property has been used substantially to accomplish illegal purposes, so that the property itself can be said to be "culpable" or an instrumentality of crime. *See Dobbins' Distillery v. United States*, 96 U.S. 395, 401 (1878) (offense "attached primarily" to distillery). Where the seized property is not itself an instrumentality of crime, however, *and* its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttable presumption that the forfeiture is punitive in nature. In using the value of the drugs as a rough measuring stick, we follow the *Halper* Court's decision to evaluate the sanction against the value obtained by Halper's criminal conduct. We also note that the Sentencing Commission, through the Guidelines, has utilized the weight of drugs and, implicitly, their value to differentiate between punishments for violations of the narcotics laws.

The government may then account under *Halper* in order to show that the forfeiture serves legitimate civil goals. The government may present its costs of investigation and detection, as well as other costs and damages attributable to the criminal misconduct of the claimant. *See* 21 U.S.C. § 881(e)(3)(A) (relating transfer of forfeited property to state agency to "total law enforcement effort with respect to the [individual] violation of law on which the forfeiture is based"). *See United States v. Hall*, 730 F. Supp. 646, 655 (M.D. Pa. 1990); *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 145, 551 N.E.2d 915 (1990) (examining governmental losses and harm to identifiable victims directly caused by physician's fraud), *cert. denied*, 111 S. Ct. 74 (1990). The assessment of costs and damages must be individualized. A reasonable allocation of more generalized enforcement costs—in the nature of overhead—may also be allowed. The allocation

must not be incommensurate with the portion of the overall enforcement problem represented by the offense at hand. While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant. This is particularly so where the individual claimant's violations are relatively minor. *See 38 Whalers Cove Drive*, 747 F. Supp. at 180; *see also Halper*, 490 U.S. at 449 (compensable portion of the "costs and damages" suffered by the government was that directly caused by the defendant); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *compare United States v. A Parcel of Land with a Building Located Thereon at 40 Moon Hill Road*, 884 F.2d 41, 44 (1st Cir. 1989). Following the accounting, the trial court may then determine whether the government has carried its burden of showing that the sanction is entirely assignable to civil purposes or whether part or all of the sanction is designed to serve punitive purposes.

3. *Application of* United States v. Halper *to the Instant Case*

With these principles in mind, we turn to the instant case. We consider first whether the forfeiture could be considered a removal of an "instrumentality of crime" from general circulation. The government apparently concedes, however, that forfeiture is not sought on this ground. *See 38 Whalers Cove Drive*, 747 F.Supp. at 178 ("The government makes no suggestion that Levin's condominium was contraband or somehow itself culpable."). We therefore do not address that argument.

Instead, the government's sole contention here is that the sanction serves other civil goals such as compensation. Following *Halper*, we therefore examine whether the forfeiture is disproportionately large, relative to the value of the drug transactions which violated 21 U.S.C. § 881(a)(7). The forfeiture of Levin's interest in the residence was close to three hundred times the total value of cocaine sold inside it. We find as a matter of law that the forefeiture is overwhelmingly disproportionate compared to the value of the relevant drug transactions, and that therefore a rebuttal presumption that the forfeiture is punitive in nature is created.

If the resulting attachment of constitutional protections under *Halper* would have any effect on the result of this case, we would be inclined to vacate Judge Nickerson's judgment of forfeiture and remand the case to permit the government an opportunity to rebut the presumption by showing through an accounting of its costs that the forfeiture is civil in nature. However, assuming *arguendo* that following a government accounting the district judge would conclude that the forfeiture, even up to the full amount of Levin's equity interest in the condominium, amounted to punishment and not a civil sanction, the judgment would still survive scrutiny. For reasons that we now turn to, the forfeiture does not violate the constitutional limits on punishment set by the Double Jeopardy Clause and the Eighth Amemdment.

a. *Double Jeopardy Clause*

Levin maintains that because the forfeiture proceeding followed his prosecution, plea of guilty, and sentencing in state court, the forfeiture violates his Double Jeopardy Clause right to be free from multiple punishments.

We disagree. Even assuming that the forfeiture is a criminal penalty, the Double Jeopardy Clause prohibits two criminal punishments for the same offense only when they are sought by the same sovereign government. The Double Jeopardy Clause is inapplicable when separate governments prosecute the same defendant, for the defendant has offended both sovereigns. *Heath v. Alabama*, 474 U.S. 82, 87-89 (1985).

Levin argues on appeal that his case falls within an exception to this "dual sovereignty" doctrine. The Double Jeopardy Clause may be violated despite single prosecutions by separate sovereigns when one "prosecuting sovereign can be said to be acting as a 'tool' of the other." *United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984) (quoting *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959)); *United States v. Jordan*, 870 F.2d 1310, 1312 (7th Cir.), *cert. denied*, 110 S. Ct. 101 (1989); *United States v. Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). This exception is not triggered simply by cooperation between the two authorities, however. The state government must have effectively manipulated the actions of the federal government, so that federal officials retained little or no independent volition. *United States v. Russotti*, 717 F.2d at 31; *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). Levin contends only that the Suffolk County Police Department will receive a portion of the forfeiture proceeds. That distribution is apparently pursuant to statute. 21 U.S.C. § 881(e)(1)(A) authorizes the Attorney General to transfer part or all of the forfeited personal property to "any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property." But the fact that the Attorney General may choose to share the forfeited property with a local law enforcement agency is inadequate to show that

the United States government, which no doubt has its own interest in the proceeds, is here acting as a "cover" for the Suffolk County Police Department. Nor does the receipt by the state enforcement agency of part of the proceeds implicate the state in any punishment by virtue of the forfeiture since the forfeiture is being effected by the United States government.

b. *Eighth Amendment*

Levin asserts that the forfeiture violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, or its Excessive Fines Clause.[3] We find the arguments without merit. The Eighth Amendment proscribes only extreme punishments. Even assuming that the entire amount of the forfeiture here is punishment, it does not violate the outer confines set by the Eighth Amendment.

The Cruel and Unusual Punishment Clause prevents the imposition of a punishment which is "grossly disproportionate" to the crime committed. *Solem v. Helm*, 463 U.S. 277, 290-92 (1983). Three factors are relevant to this inquiry: (1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. We need not linger over the first factor. Levin does not dispute his participation in two sales of cocaine. The Supreme Court has recognized the serious threat to individuals and society posed by drug offenses in the context of an Eighth Amendment analysis. *See Harmelin v. Michigan*, ____ U.S. ____, 111 S. Ct. 2680 (1991) (upholding mandatory life sentence for pos-

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3 Levin appears to mention, but does not press, the possibility that the Excessive Fines Clause might apply to sanctions purely civil in nature. *See Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. at 263-64, 275. We accordingly decline to address the issue.

session of 672 grams of cocaine); *id.* at 2698 (Scalia, J.) (Michigan legislature may take appropriate measures to address "the situation on the streets of Detroit"); *id.* at 2706 (Kennedy, J.) (petitioner's drug offense threatened "grave harm"); *see also National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (drug use and distribution one of "greatest problems affecting the health and welfare of our population").

Further, the punishments meted out by the federal government and other jurisdictions for similar crimes indicate that the forfeiture of Levin's condominium is not aberrational. Federal law authorizes a sentence of twenty years and a fine of $1,000,000 for the distribution of cocaine in an amount less than 500 grams. 21 U.S.C. § 841. The Sentencing Guidelines assign a Base Offense Level of 12 to transactions involving less than 25 grams of cocaine. Depending upon criminal history, a defendant who had distributed the same amount of cocaine as Levin would presumptively be fined $30,000 and receive a sentence of 10 to 37 months. The state courts in this circuit authorize punishments on a similar scale. Under New York law, a defendant who had distributed the same quantity of cocaine as Levin would be exposed to 8 years and 4 months imprisonment and $50,000 in fines. N.Y. Penal Law §§ 220.41, 70.00, 80.00. Under Vermont law, a defendant distributing 2.5 grams or more of cocaine (but less than one ounce) may receive five years of imprisonment and a fine of $100,000. Vt. Stat. Ann. tit. 18, § 4231. Connecticut law authorizes a sentence of 20 years and a fine of $10,000 for distribution of more than 0.5 grams of cocaine. Conn. Gen. Stat. § 21a-278(b); § 53a-41. We recognize that these are merely possible sentences and are not conclusive as to what a court might do in an individual case. Nonetheless, we infer from the statutes

that the imposition of the equivalent of a $68,000 fine in this case, while large, is not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence.

As to the Excessive Fines Clause, the Supreme Court has provided no guidance, except to observe that fines must be closely scrutinized because they benefit the government. Unlike other forms of punishment that impose costs on government, fines create revenue. *Harmelin v. Michigan*, 111 S. Ct. at 2693 n.9 (Scalia, J.); *cf. Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. at 275 (Excessive Fines Clause possibly applicable to revenue-raising efforts through fines, other payments, or forfeitures). We need not decide at exactly what point a fine or forfeiture might violate the Excessive Fines Clause, for wherever such a line could be drawn, this forfeiture would be proper. Judging from the penal laws of the United States and the various states mentioned above, a fine of many thousands of dollars for a minor drug offense is not beyond the pale. *Cf. Calero-Toledo v. Pearson Yacht Leasing Co., supra* (upholding against due process challenge seizure of innocent owner's $19,800 yacht upon which marijuana cigarette was discovered). We conclude that the forfeiture, if truly a punishment, does not violate the Eighth Amendment.

CONCLUSION

The judgment of forfeiture is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

88 C 3550

UNITED STATES OF AMERICA,

Plaintiff,

—against—

CERTAIN REAL PROPERTY AND PREMISES KNOWN AS 38 WHALERS COVE DRIVE, BABYLON, NEW YORK,

Defendant.

ANDREW MALONEY, United States Attorney
(Stephen J. Riegel, Esq., of Counsel)
Brooklyn, NY
for Plaintiff

RICHARD B. LIND, ESQ.
New York, NY
for claimant Edward J. Levin

MEMORANDUM AND ORDER

NICKERSON, *District Judge*:

This action arises from an order under 21 U.S.C. § 881(a)(7) of the Comprehensive Drug Abuse and Control Act of 1970 authorizing seizure of a condominium alleged to have been used to "facilitate" two cocaine sales. Claimant Edward Levin moves to dismiss the complaint. The United State cross-moves for summary judgement.

Levin argues that his property was not used to "facilitate" a drug transaction under § 881(a)(7) and that the forfeiture would violate his rights under the Eight Amendment and the Double Jeopardy and Due Process clauses of the Fifth Amendment to the United States Constitution.

I.

The critical facts ate undisputed.

Levin, the owner of the condominium, was arrested for three sales of cocaine to undercover agents. On July 6, 1988, a confidential informant and a Suffolk County police officer, Joseph Emiddio, went to Levin's home and bought one and one half grams of cocaine for $150. Levin says that the confidential informant requested that the sale take place in the condominium. According to Emiddio, Levin produced a half-gram packet of cocaine from a bowl in his kitchen cabinet. The second sale took place on July 20, 1988, also at Levin's home. Emiddio paid Levin $100 for a plastic vial containing one gram of cocaine, which Levin produced from the second floor of the premises. Another sale, not at issue in this proceeding, took place in Levin's car.

During the next ten weeks Emiddio called Levin several times per day to arrange further drug transactions, but Levin was unwilling. Levin also states Emiddio was aware that he had minor drug habit, and that the small amount of drugs Emiddio saw were clearly for Levin's personal use.

Immediately upon his arrest in October 1988 on charges of criminal sale of a controlled substance in violation of § 220.39.1 of New York Penal Law, Levin cooperated with the Suffolk County Police, acting as intermediary in another narcotics sale held at the condominium at Emiddio's direction.

A search of the premises disclosed no drugs, weapons, or other evidence of drug trade. The United States seized the premises on November 4, 1988. In March 1989, Levin pled guilty to one count of attempted criminal sale of a control substance in the third degree, pursuant to Section 110.05 of the New York State Penal Law.

Since the seizure Levin and a friend have continued to reside at the premises under an "Occupancy Agreement" with the government.

II.

The statutory provisions relating to drug abuse prevention and control are contained in 21 U.S.C, §§ 810—971. Section 853 provides for criminal forfeiture from those convicted under the statute. Section 881 provides for civil forfeiture, and section 881(a)(7), the subsection at issue here, in pertinent part, makes "subject to forfeiture to the United States":

> All real property, including any right, title, and interest . . . in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of the title punishable by more than one year's imprisonment[.]

Where the government seeks a forfeiture section 881(d), which incorporates the procedures provided for in 19 § 1615 for customs forfeitures, places upon it the burden to demonstrate probable cause to believe the property was used, or intended to be used, to facilitate a drug transaction punishable under federal law. Then, unless the claimant introduces evidence that the government has not met factual predicates for forfeiture, the court may grant summary judgment for the government. *United States* v. *The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1267 (2d Cir. 1989).

The sale by Levin of any amount of cocaine was punishable under Section 841(b)(1)(C) by more than one year's imprisonment. Levin does not deny making the sales but argues that he did not use his condominium to "facilitate" their commission within the meaning of section 881(a)(7). He cites the legislative history, in particular the 1984 Senate Committee Report, explaining the addition of real property to the list of items forfeitable. The report states:

> Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to

> store tons of marijuana or uses his house as manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.

S. Rep. No. 225, 98th Cong., 1st Sess. 195, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3378 (Senate Report).

Levin says that his condominium was far from "indispensable" to the two minor cocaine sales and that in any event he committed no "major" drug offense. He contends that before finding the home forfeitable, the court must find a "substantial connection" between the use of the property and the drug sales.

The court has found no decision construing the above passage from the Senate Report as suggesting that as a condition of forfeiture the court must find the property "indispensable" to the drug transaction, *see*, *United State* v. *Certain Lots in Virginia Beach*, 657 F.Supp. 1062, 1065 (E.D. Va. 1987). Some courts have read the legislative history to require a finding and the "substantial connection" between the property and the drug transaction. *See id*, and *United States* v. *$12,585*, 669 F.Supp. 939 (D. Minn. 1987). But the Court of Appeals for this circuit rejected such standard and held that there need only be a "sufficient nexus." *See United States* v. *One 1974 Cadillac Eldorado*, 548 F. 2d 421, 423 (2d. Cir. 1977), *South Livonia Road*, 889 F. 2d 1258 at 1269.

On two occasions claimant produced a controlled substance for sale from a place in his dwelling. The use of the premises repeatedly to sell and to safekeep drugs undoubtedly "facilitated" the ensuing sales according to the common definition of the term, "to make easier." *The Random House Dictionary of the English Language* 840 (1969). Although Levin's unrefuted affidavit says that one of the sales took place at his home on the suggestion of the police officer, he makes no contention that the presence of drugs in his home was momentary or merely fortuitous. *Cf. Certain Lots in Virginia*

Beach, *supra*, 657 F.Supp. at 1065. The court finds the sufficient nexus between the property and the drugs to conclude that claimant used his home to "facilitate" their sale.

The court rejects the argument that the statute authorizes forfeiture of property only when used to facilitate "major" transactions. The wording of the statute does not so provide. It allows forfeiture if the property is used to facilitate commission of even a single felony punishable under Title 21. As noted above, the sale of any amount of cocaine is such a felony. The Court of Appeals for this circuit has held that forfeiture may be predicated on a minute quantity of drugs. *See South Livonia Road*, 889 F.2d at 1269-1270 and *United States* v. *One 1986 Mercedes Benz*, 846 F.2d 2, 5 (2d Cir. 1988).

The government has shown that there was probable cause to believe Levin used his condominium to facilitate cocaine sales. He has not called the government's proof into question. Forfeiture in this case may produce a harsh result, rendering homeless a man whom the state court declined to incarcerate. But that is what section 881(a)(7) contemplated. *See South Livonia Road*, 889 F.2d at 1271.

III.

A.

The question remains whether the statute as applied is unconstitutional.

Levin invokes several constitutional provisions.

The Double Jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." The Eight Amendment recites, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property without due process of law."

B.

Even if forfeiture in this case were to be regarded as a criminal "punishment," the Double Jeopardy clause does not apply. It prohibits two criminal punishments for the same offense only where inflicted by the same sovereign. *Heath* v. *Alabama*, 474 U.S. 82, 87-89 (1989). The United States does not subject a person to double jeopardy when it seeks a forfeiture predicated on acts already punished by the state. *See United States* v. *A Parcel of Land with a Building Located Thereon*, 884 F.2d 41, 43 (1st Cir. 1989). Thus, even if a punishment, the forfeiture is not a punishment for the "same offense" for which the state convicted Levin.

C.

The government may seek forfeiture of property associated with drug transactions in criminal prosecutions, e.g. 21 U.S.C. § 853, or in civil proceedings, e.g. 21 U.S.C. § 881. Where the proceeding is avowedly criminal, plainly the accused is entitled to all the procedural protection offered by the Fifth and Sixth Amendments. He also receives the substantive benefit of the Eight Amendment's prohibitions against excessive bail or fines and cruel and unusual punishments.

Where the proceeding is labelled "civil", the chief question with which the cases have struggled is to what extent, if at all, the person whose property is at stake must be given the procedural and substantive rights accorded a person charged with crime. Frequently the decisions have turned on whether the forfeiture is deemed a "punishment".

In a criminal case the defendant may be punished by being fined or by being required to forfeit property, at least where the property was obtained through the crime, or was used in connection with or to facilitate the crime. *See e.g.*, 21 U.S.C. § 8536 and 18 U.S.C. § 1963(a). The only limitation is that imposed by the Eight Amendment's prohibition of "excessive fines" or "cruel and unusual punishments." Under that amendment the criminal punishment may not be "dispropor-

tionate t the crime committed." *Solem* v. *Helm*, 463 U.S. 277, 284-88 (1983) and cases cited.

Where forfeiture is sought in a proceeding denominated as civil, the law is not so simple. *In rem* forfeiture, that is, forfeiture of the thing, grew from the ancient notion that an instrument of harm is itself culpable, and must provide expiation for the injury. *See* O. Holmes, The Common Law, Ch. 1 (1881) and the oft-quoted passage from Exodus 21:28, "[i]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten." The early English institution of the *deodand*, something "given to God," required that the value of an instrument of death be forfeited to the King, who would apply it to charitable uses or masses for the victim's soul. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n. 16, 682 (1974). Though the *deodand* vanished from English law, the ascription of personality to offending objects persisted into the modern law of civil forfeiture. *See J.W. Goldsmith, Jr.* v. *United States*, 254 U.S. 505 510-11 (1921).

In the United States, *in rem* forfeiture was early established in federal law though navigation and customs acts allowing seizure of vessels or property used in violation of the law, a useful expedient in situations where the owner might be difficult to bring into court. *See* Note, *A Proposal to Reform Criminal Forfeiture Under RICO and CCE*, 97 Harv. L. Rev. 1929, 1933 (1984). The fiction of holding the property, rather than the owner or crew, responsible for the offense served to assure indemnity to those injured. *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 209, 233-34 (1844); *cf. Dobbin Distillery* v. *United States*, 96 U.S. 395 (1877) (forfeiture of distillery operated to defraud the government).

Even in more recent times the Supreme Court recognized that the harmful nature of a thing or the illegality of the claimant's possession of it justified its forfeiture as "contraband". *See One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 699 (1965); *cf. United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (forfeiture served to keep "potentially dangerous weapons out of the hands of unlicensed dealers").

The government makes no suggestion that Levin's condominium was contraband or somehow itself culpable. The court has thus no need to consider what vestiges of the ancient fiction remain in the law. *See United States* v. *Tax Lot 1500*, 861 F.2d 232, 235 (9th Cir. 1988); *United States* v. *Huber*, 603 F.2d 387, 397 (2d Cir. 1979).

The government does contend that the forfeiture cannot constitute a "punishment" within the meaning of the Eight Amendment because this is a "civil" not a "criminal" proceeding. Such an argument based on the label affixed by the statute has already been rejected by the Supreme Court.

In *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2913-14 (1989), the Supreme Court concluded that the Eight Amendment provided no basis for disturbing a punitive damage award in a civil jury trial. But the Court took pains to base its decision not on the proposition that the amendment applies only to criminal proceedings, but rather on historical evidence that it applies only where the government, rather than a private party, takes positive steps to punish an individual. *Id.* at 2920. In this case the government seeks forfeiture.

In *Unites States* v. *Halper*, 109 S.Ct. 1892 (1989), the Court held that in a particular case a "civil penalty" may be "so extreme and so divorced" from any compensatory of remedial interest of the government as to constitute punishment for the purpose of double jeopardy.

This was wholly consistent with the court's easier holding, that Congress may impose "both a criminal and a civil sanction in respect to the same act or omission." *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938). The form of the proceeding is not conclusive. If the civil penalty is sufficiently great and sufficiently unrelated to any compensatory or remedial interest of the government, it may be deemed a punishment inflicted chiefly to deter or incapacitate. *See South Livonia Road*, *supra*, 889 F.2d at 1270.

As noted above, the government may seek forfeiture of real property associated with the commission of a federal narcotics felony under both civil and criminal statutes, 21 U.S.C. § 881 (1984) and 21 U.S.C. § 853 (1984) respectively.

Both provisions were enacted in the Comprehensive Crime Control Act OF 1984 (the Act), P.L. 98-473, 98 Stat. 1873, and both use identical language in describing real property subject to forfeiture as that "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a narcotics felony. 21 U.S.C. § 853(a)(2) and § 881(a)(7).

The legislative history shows that Congress designed the criminal provisions to serve as an alternative to civil forfeiture in all drug felony cases. Senate Report at 193 and 3182, 3376. As the purpose of the legislation was to enhance the utility of both types of forfeiture for law enforcement, the report distinguishes criminal and civil actions only in their respective procedural advantages and disadvantages, Senate Report, at 192-96 and 3375-79. One aspect of the Act's reforms was the importation of certain advantages from each proceeding into the other's scheme. For example, the Act brought real property within the scope of civil as well as criminal forfeiture, and provided a means for preliminary seizure of assets in criminal as well as in civil proceedings. *See id.*

No distinction between the purposes of civil and criminal forfeiture is apparent from the legislative history, which describes both as weapons of deterrence.

> Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

Senate Report at 191 and 3374.

Both sections provide that the assets seized are to be applied to defray expenses incurred by the government in drug law enforcement. 21 U.S.C. § 881(e).

The similarity of function and purpose of § 881 and its criminal counterpart, § 853, show that both sections share punitive and remedial goals. The Senate Report describes forfeiture as "an attack on the economic aspects" of drugs crime, necessary "to deter or punish the enormously profitable trade in dangerous drug." *Id.*

Retribution and deterrence are not legitimate nonpunitive governmental objectives. *Bell* v. *Wolfish*, 411 U.S. 520, 539 n. 20 (1979). On the other hand, the application of property seized towards the government's enforcement expenses, *see* 21 U.S.C. § 881(e), is a well-recognized remedial purpose. *See*, *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 238 (1972).

The presence of both punitive and remedial goal does not of itself convert a civil statute into a criminal measure, or vice versa. To some degree all civil forfeiture acts as a deterrent to owners of property, if only to encourage them to take all reasonable care of their property is not put to an illegal use. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 690-91 (1974). Indeed, the application of ordinary tort law usually has a deterrent effect.

The material inquiry is not whether civil forfeiture is punitive in purpose and effect. It is usually is. The question is whether the forfeiture serves some alternate purpose as well, and whether the penalty inflicted is excessive in relation to that alternative purpose. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

The interest protected by the Eight Amendment prohibiting "excessive" punishment is similar to that protected by the due process clause of the Fifth Amendment. Due Process "protect(s) . . . the individual against arbitrary action(s) of government,: *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted), including imposition of civil penalties so "grossly excessive" as to be oppressive. *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86 (1909). The government may not prescribe a penalty "wholly disproportioned to the offense

and obviously unreasonable." *Saint Louis, I. M. & S Railway Co.*, v. *Williams*, 251 U.S. 63, 67 (1919). Even where a penalty may serve both compensatory and punitive ends, the government may "no more assess excessive damages than . . . impose excessive fines." *Standard Oil Co.* v. *Missouri*, 224 U.S. 270, 286 (1911).

Where an owner has done all that can reasonably be expected to prevent the prescribed use of the property, a civil forfeiture "would simply be an arbitrary act, serving no legitimate government interest, oppressive and harsh, and in our view contrary to the Fifth Amendment." *United States* v. *One Tintoretto Painting*, 691 F.2d 603, 608 (2d Cir. 1982), *citing Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974). Similarly, where an owner negligently or wilfully permits property to be used in violation of the criminal law, due process requires that a civil penalty bear some reasonable relation to the purpose of compensating the government for its efforts in attempting to discover the violation, to prosecute the violators, and to avert or mitigate the consequent harms.

In *Halper*, statutory penalties for 65 violations of the False Claims Act, amounting to over $130,000, were sufficiently unrelated to the government's losses of $585 from Medicare overcharges and approximately $16,000 in cost for investigating and prosecuting the offender as to constitute a criminal penalty. 109 S.Ct. 1892 (1989). Double jeopardy prohibited the government from imposing first a criminal punishment and then a civil penalty for the same conduct where the civil judgment is not "rationally related to the goal of making the Government whole." *Id.* at 1903

The court must this consider whether forfeiture pursuant to a civil statute and civil procedure is rationally related to a remedial goal. Where a civil forfeiture "would be unreasonable and not remotely related to both the actual losses and inexplicable damages incurred by the government," the court should decline to enforce it. *Paterson* v. *Richardson*, 370 F.Supp. 1259, 1267 (N.D. Tex 1973) *aff'd sub nom. Peterson* v. *Weinberger*, 508 F. 2d 55 (5th Cir.), *cert. denied sub.*

nom. Peterson v. *Matthews*, 423 U.S. 830 (1975) (reducing applicable penalty under the False Claims Act).

No clear line divides punitive from remedial purposes. *See generally* Clark, Civil and Criminal Penalties and Forfeiture, 60 Minn. L. Rev. 379 (1976). Some decisions have describes § 881 as having the "remedial" purpose to diminish the economic power of drug traffickers and deprive them of the and instrumentalities useful in their trade. *See United States* v. *$2,500 in the United States Currency*, 689 F.2d 10, 13-14 (2d Cir. 1982); *United States* v. *6109 Grubb Road*, 708 F. Supp. 698 (W.D. Pa 1989).

The distinction between incapacitation and deterrence is particularly elusive. *See* Clark, *supra*, at 475-481. In the case of contraband, where possession of the property is unlawful, the government's seizure removes it from circulation for the public good, as in the seizure of controlled substances under 21 U.S.C. § 881(a)(1).

However, there is nothing inherently unlawful about possessing a condominium. A forfeiture in the present case may incapacitate the owner who permits the illegal use, but hardly rids society of a noxious instrumentality. Incapacitation could also be accomplished by criminal measures, avowedly punitive, such as imposing heavy fines, or constraining the person's liberty by imprisonment. *See One 1958 Plymouth Sedan*, 380 U.S. 693, 699 (1965). It was just such a practice of economically disabling those whom the Stuart considered dangerous that led to the incorporation in the English Constitution of the precursor to the excessive fines clause of the Eight Amendment. *Browning-Ferris Industries*, 109 S.Ct. at 2916.

The aim of compensating the government for its efforts to prevent or mitigate the harms caused by the property's unlawful use is a remedial goal. That harm consists not only of the illicit profits form the actual sale, but the severe collateral consequences of facilitating drug traffic, such as drug addiction, increased drug-related violence, and the government's enforcement costs. All these are ills the drug laws were designed to address. *See* § 101 of the Comprehensive Drug Abuse and Control Act of 1970, *codified at* 21 U.S.C.

§ 801(2) and H. Rep. No. 91-1444, 91st. Cong. 2d Sess. (1970), *reprinted in* 1970 U.S. Code. Cong. & Admin. News 4573; S. Rep. No. 225, 98th Cong. 1st Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3374; and *United States* v. *$2,500 in United States Currency*, *supra*, at 13 n.2.

While the entire magnitude of the national drug problem cannot be laid at the feet of any one drug offender, *cf. United States* v. *A Parcel of Land with a Building Located thereon*, 884 F. 2d 41, 44 (1st Cir. 1989), the government is entitled to compensation because of the injury inflicted by Levin's conduct. The Supreme Court has recognized that assessing damages is not an exact pursuit, and involves an element of "rough justice." *Halper* at 1902.

An imprecise formula, such as double damages, may pass muster under constitutional scrutiny. *See id.* at 1900: *Missouri Pacific Railway Co.* v. *Humes*, 115 U.S. 512, 522-23 (1885). However, forfeiture is a penalty without clear limits. The value of the property is not inevitably related to the harmfulness of the use to which it is put. *See United States* v. *Busher*, 817 F.2d 1409, 1414 (9th cir. 1987) (forfeiture under 18 U.S.C. § 1963(a)) and *South Livonia Road*, 889 F.2d at 1270.

Here, Levin used his home more than once to conduct transactions. Although perhaps trivial in their dollar amount, these sales are quite serious in their collateral consequences. The maintenance of the programs to deal with drug proclaims is expensive. Moreover, there were immediate costs to the federal government in bringing this proceeding, and to Suffolk County for its law enforcement efforts, which may be compensated from the proceeds of any forfeiture. *See* 21 U.S.C. § 881(e)(1)(A) and 19 U.S.C. § 1616(a)(2).

Forfeiture of Levin's approximately $70,000 interest in the condominium does not seem a grossly excessive amount for his share of the costs of remedying the ills occasioned by drugs. Though there may be cases where further elaboration of the government's loss would be warranted, this is not a forfeiture that stands near the line between remedy and punishment. *See South Livonia Road*, 889 F.2d at 1270.

Forfeiture in this case is a civil penalty that offends neither due process nor the Eight Amendment.

VI.

The court finds the government has established, and Levin has failed to rebut, that his condominium is subject to forfeiture under 21 U.S.C. § 881(a)(7). The forfeiture does not offend the constitution. The government's motion for summary judgment is granted, and claimant's motion to dismiss is denied.

Dated: Brooklyn, New York
September 18, 1990

Eugene H. Nickerson, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 90-6268

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of January, one thousand nine hundred and ninety-two.

Present: HON. LAWRENCE W. PIERCE,
HON. RALPH K. WINTER,
HON. JOHN M. WALKER,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

CERTAIN REAL PROPERTY AND PREMISES KNOWN AS 38 WHALERS COVE DRIVE, BABYLON, NEW YORK,
Defendant,

EDWARD J. LEVIN,
Claimant-Appellant.

[AMENDED OPINION]

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgement of said District

Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk
By: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 90-6268

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of January, one thousand nine hundred and ninety-two.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

CERTAIN REAL PROPERTY AND PREMISES KNOWN AS 38 WHALERS COVE DRIVE, BABYLON, NEW YORK,

Defendant,

EDWARD J. LEVIN,

Claimant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Claimant-Appellant, Edward J. Levin.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk